(9)

No. 93-670

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,

*Petitioner*,

*v.*

BIRKDALE SHIPPING CO., S.A.,

*Respondent*.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## BRIEF OF RESPONDENT


Carl D. Buchholz, III
Counsel of Record
Michael P. Zipfel
RAWLE & HENDERSON
The Widener Building
One South Penn Square
Philadelphia, PA 19107
(215) 575-4200

*Counsel for Respondent, Birkdale Shipping Co., S.A.*


PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-8000

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## QUESTIONS PRESENTED

1. Does a shipowner have a nondelegable duty under Section 5(b) of the Longshore and Harbor Worker's Compensation Act to ensure the safety of discharging longshoremen from defects in the cargo stow created by the cargo operations of an independent loading stevedore?

2. Does a shipowner have a duty to supervise and inspect the cargo operations of an independent stevedore for the safety of the longshoremen who will board the vessel in a subsequent port?

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## COUNTERSTATEMENT OF CASE

Petitioner Albert Howlett is a longshoreman who allegedly slipped and fell while assisting with the discharge of cocoa beans from the M/V PRESIDENTE IBANEZ, a vessel owned by respondent Birkdale Shipping Co., S.A.[1] On the day in question, petitioner, an employee of Northern Shipping Company, was working in the vessel's No. 2 hatch, hooking up drafts of cocoa beans for discharge. (J.A. 5-9, 42). Northern Shipping had been hired as a stevedoring expert by respondent. Prior to his accident, petitioner and the other longshoremen working in the hatch hooked up four or five drafts of cocoa beans which were lifted out of the hold without incident. (J.A. 9). While these initial drafts were being discharged, petitioner and the other longshoremen were working on top of the bags of cocoa beans. (J.A. 7-8).

Immediately prior to petitioner's accident, the longshoremen hooked up the first draft of cocoa beans which was stowed directly on the steel deck. (J.A. 9). When this draft was lifted, it exposed an area of the deck which was approximately eight square feet. (J.A. 17). While the cargo was dangling overhead, petitioner jumped down from the surrounding cocoa beans to the exposed deck, a distance of approximately three feet. (J.A. 10). Petitioner explained that he jumped down into the open space so he could "get [ ] out of the way" while the cargo was lifted. (J.A. 10). When he jumped down, petitioner allegedly slipped and fell because there was a plastic covering on the deck. (J.A. 17-18).

As noted, the exposed area of the deck was approximately eight square feet. (J.A. 17). Petitioner testified that this entire area was covered by plastic. (J.A. 11). Although petitioner denied seeing the plastic before jumping down into the open space, the plastic was visible to his co-workers. Joseph Fisher, a longshoreman who witnessed the accident, testified that he could see the plastic when he looked down at the exposed area.

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1. Birkdale Shipping Co., S.A. is a foreign corporation which is not publicly traded.

(J.A. 40-41). In addition, Raymond McMullen, another longshoreman, testified that he could see the plastic from the top deck of the vessel when he looked down into the hatch. (J.A. 38-39).

The Master of the M/V PRESIDENTE IBANEZ at the time of the alleged accident was Captain Daniel Cafena. Captain Cafena testified that the cocoa beans in the No. 2 hatch were loaded by a foreign, independent stevedore in Guayaquil, Equador. (J.A. 19-20, 31). In addition, Captain Cafena testified that it was the loading stevedore who made the decision regarding the material that was placed under the cocoa beans to protect them from condensation. (J.A. 21, 25, 18). Captain Cafena stated that if he saw plastic being placed under the cocoa beans, he would have registered a complaint with the stevedore since plastic could cause damage to the beans. (J.A. 32, 34). Furthermore, Captain Cafena testified if any member of his crew saw plastic being used for this purpose, they would have reported it to him and he would have asked the loading stevedore to remove the plastic. (J.A. 22, 32, 34-35).

Contrary to the assertion contained in petitioner's Brief, Captain Cafena did not "require" the stevedore to place wood and paper under the cocoa beans; it is simply standard practice for the loading stevedore to place a separation material under cocoa beans to protect the beans from condensation damage. (J.A. 27-28, 34). The decision to place wood, paper, or any other separation material under the cocoa beans was made by the stevedore. Captain Cafena simply testified that if he, or a member of his crew, noticed that the loading stevedore was not placing a separation material under the cocoa beans, or if the stevedore used a material, like plastic, that would cause rather than prevent condensation damage, he would have registered a complaint. (J.A. 22, 32, 34-35).

In his Brief, petitioner correctly points out that it was the usual practice of this ship to have members of the crew present on deck during cargo operations. (J.A. 22). Petitioner's Brief is misleading, however, to the extent it implies that observing cargo operations was the sole, or even primary, activity of these crewmembers. Captain Cafena testified that while these crewmembers were on deck, they were watching the cargo, watching



for stowaways, watching for persons attempting to steal cargo or smuggle drugs, and generally "protecting the ship." (J.A. 21, 23-24, 32). Therefore, contrary to what is implied in petitioner's Brief, these crewmembers were not on deck to supervise or inspect the details of the stevedore's loading operation.

At his deposition, Captain Cafena testified that if plastic had been placed under the cocoa beans during the loading operation in Guayaquil, the crewmembers on deck "should have" seen it and, if they did, they would have reported it to him. (J.A. 23-24, 33).[2] The condition was not reported to the Captain and petitioner failed to offer any evidence to support a finding that any crewmember observed plastic on the deck. Furthermore, there is no indication that plastic was used as a separation material on any deck, or in any hold, other than the immediate deck area where petitioner allegedly fell. (J.A. 39-40).

If there was a piece of plastic on the deck as alleged, respondent has never disputed that the plastic would have come from the vessel's supplies since the vessel made available all of the materials needed for stowing cargo in the various hatches, i.e., paper, plywood, dunnage and plastic. (J.A. 25, 28). There is no evidence, however, that the vessel knew what the loading stevedore intended to do with the plastic. More specifically, there is no evidence that the vessel knew that the loading stevedore placed plastic on the deck under some of the cocoa beans. (J.A. 32). Plastic can be used by a loading stevedore for a myriad of purposes aboard a vessel, including the loading of chemical drums. (J.A. 26, 32).[3]

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2. As respondent pointed out in the district court, Captain Cafena was speaking in terms of visual observations, not in terms of legal duties.

3. Throughout the course of this case, petitioner has alleged that there was no "legitimate" need for plastic during the loading operation in Guayaquil; therefore, the vessel must have known that it was being used as a separation material. This assumption is unwarranted and unsupported. Loading cargo is not an exact science; conditions arise during the course of cargo operations which the expert stevedore must correct or solve. That is the reason why expert stevedores are hired. The loading stevedore in Guayaquil could have obtained a sheet of plastic to separate lots of cargo, or to cover the cocoa beans to protect them from the weather during loading or water entry into the hatch during the voyage.

Petitioner's Brief is also misleading to the extent it implies that the respondent vessel owner knew, or should have known, that placing plastic on the deck would present a improper or unsafe condition for the discharging stevedore. There is no evidence to support this assertion. Captain Cafena did testify, as petitioner asserts, that plastic "should not have been under the cargo." *See* Petitioner's Brief at p. 4. Captain Cafena, however, stated that using plastic as a separation material was improper because, and only because, it could cause damage to the cocoa beans. (J.A. 34). There is no evidence to suggest that Captain Cafena knew, or had any reason to anticipate, that placing plastic on the deck would create a dangerous condition for the longshoremen in the discharge port.[4]

Finally, petitioner asserts that the "dangerous condition" in question, the plastic on the deck, was a condition that a longshoreman "had no reason to anticipate." *See* Petitioner's Brief at p. 5. This is simply not true. When the draft of cocoa beans was lifted out of the hold immediately before the alleged accident, it exposed an area that was approximately eight square feet. (J.A. 17). Two of petitioner's co-workers admitted that they saw the plastic when they looked at the exposed area; in fact, one of these men saw the plastic from the top deck of the vessel. (J.A. 38, 39-41).

## SUMMARY OF ARGUMENT

1. In this appeal, petitioner seeks to impose upon shipowners a duty to supervise and inspect the cargo operations of an independent loading stevedore. In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court already determined that, in accordance with the purpose and intent of the 1972 Amendments to the Longshore & Harbor Workers' Compensation Act (33 U.S.C. § 905(b)), vessel owners do not have a duty to supervise the work of an independent stevedore "to discover dangerous conditions that develop or come to light during the loading or unloading" of a vessel. *Scindia*, 451 U.S.

4. Respondent has always disputed petitioner's allegation that plastic on the deck of a vessel presented "an unreasonable risk of harm" for a reasonably competent stevedore.



at 167. The duty proposed by petitioner, therefore, has already been rejected by this Court.

2. The authorities cited by the petitioner do not provide a basis for distinguishing or disregarding the holding in *Scindia* and do not provide any basis for requiring vessel owners to supervise the work of an independent stevedore. In *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), which is the genesis of petitioner's theory of liability, the Ninth Circuit Court of Appeals imposed a duty on shipowners to supervise the work of foreign stevedores, thereby creating a broad and unwarranted exception to section 905(b) which was not authorized or envisioned by Congress when it enacted the 1972 Amendments. The *Turner* holding should be rejected as a case of judicial encroachment upon the role of the legislature.

3. The Legislative History to the 1972 Amendments clearly evidences Congress' intent to eliminate lawsuits against shipowners based upon theories of unseaworthiness or a "non-delegable duty" to provide a safe place to work. Although petitioner describes his theory of liability as a form of "maritime negligence," the duty he seeks to impose is a non-delegable duty to provide a safe place to work. The authorities cited by petitioner do not provide a basis for disregarding Congress' mandate.

4. The duty proposed by the petitioner, if imposed, would result in decreased, not increased, safety for the discharging longshoremen. A review of the reported cases dealing with cargo accidents reveals that the negligence of the discharging "stevedore-employer" is the primary, if not sole, cause of the accident the majority of the time. The discharging stevedore is presumed to be an expert in cargo operations and has a legal duty to identify and remedy cargo hazards before and during the discharge operation. If petitioner's duty were imposed, the stevedore-employer would have no incentive to employ the safest means of discharge since vessel owners would be deemed liable for all cargo accidents and the stevedore-employer would recover its full compensation lien.

5. In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988), the Third Circuit

Court of Appeals properly interpreted the legislative intent underlying the 1972 Amendments and this Court's holding in *Scindia,* and correctly concluded that vessel owners do not have a duty to supervise or inspect the work of an independent, loading stevedore, whether foreign or domestic.

## ARGUMENT

### I. INTRODUCTION

In *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981), this Court defined the duties that a vessel owner owes to the longshoremen who board the vessel to conduct cargo operations. Before the vessel is turned over to the stevedore, the vessel has a duty of "ordinary care" to have the "ship and its equipment" in reasonably safe condition, and a corollary duty to warn about hidden hazards involving the ship's structure that would not be obvious to or anticipated by a reasonably competent stevedore. Once the vessel has been turned over to the stevedore for cargo operations, however, the vessel can justifiably rely upon the expert stevedore to perform its duties safely and properly. Therefore, in *Scindia,* this Court held that vessel owners do not have a duty to supervise or inspect the cargo operations of an independent stevedore and, generally, may not be held liable for hazards that are created or arise during the loading or unloading operation. *Id.* at 167.

Through this appeal, petitioner seeks to create an extensive and unwarranted exception to this Court's holding in *Scindia.* Specifically, petitioner seeks to impose a duty on the vessel owner to inspect and supervise the loading operation of independent stevedores for the safety of the longshoremen who will board the vessel in a subsequent port. This proposed "duty" is not warranted by the 1972 Amendments to the Longshore & Harbor Workers' Compensation Act, or by the *Scindia* decision. Simply stated, petitioner seeks to impose a non-delegable duty upon vessel owners to provide longshoremen with a safe place to work, a duty which was expressly rejected by Congress in the 1972 Amendments. Furthermore, the duty advanced by petitioner, if accepted, would dismantle the framework of duties



established in *Scindia* and would effectively eviscerate the principles carefully set forth in that opinion.

### II. THE ESTABLISHED LAW

In 1972, Congress enacted several important Amendments to the Longshore & Harbor Workers' Compensation Act. 33 U.S.C. §901, et seq. These Amendments represented a carefully constructed compromise which balanced the interests of longshoremen, stevedores and shipowners:[5]

> A tradeoff was made by Congress in an attempt to balance the interests of all parties involved. Under the plan as formulated by Congress, the longshoreman lost his claim against the vessel under the warranty of seaworthiness allowed by *Sieracki,* and in return was granted much higher

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5. On page 36 of his Brief, petitioner asserts that the "1972 Amendments were designed to provide relief for employer-stevedores, and not for, but at the expense of, shipowners. . . ." In addition, petitioner asserts that "[s]hipowners lost as a result of the 1972 Amendments because they became liable for injuries caused by negligence – a liability they therefore had been escaping under the *Ryan Stevedoring* indemnity cases." *See* petitioner's Brief at p. 36. These statements are totally inaccurate. The doctrines of unseaworthiness and "non-delegable duty" supplanted the concept of negligence during their reign. Therefore, while a negligence action was always cognizable, it was simply unnecessary. Thus, it cannot be stated, with any degree of candor, that by eliminating the doctrines of unseaworthiness and "non-delegable duty" Congress intended to increase the liabilities or duties of a vessel owner. As a result of the increased compensation benefits available to longshoremen, which shipowners contribute to in the form of higher stevedoring costs, Congress determined that there was "no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen . . . ." H. Rep. No. 92-1441, 92nd Cong., 2nd Sess., reprinted in U.S. Code Cong. & Admin. News, 4698, 4703 (1972). *See also Munoz v. Flotz Merchante Grancolumbiana, S.A.,* 553 F.2d 837, 839 (2d Cir. 1977) ("Congress, by its extensive overhaul of the LHWCA in 1972, sought to achieve several goals: adequate, increased and sure compensation for injured longshoremen, elimination of the rubric of liability without fault for shipowners, and encouragement of safety within the industry by placing the duty of care on the party best able to prevent accidents."); *see e.g.,* Weiler, *Worker's Compensation and Product Liability: The Interaction of a Tort and a Non-Tort Regime,* 50 Ohio St. L.J. 825, 841-42, 849-50 (1989).

> compensation benefits. The stevedoring company that employs the longshoreman was forced to pay the higher workmen's compensation benefits, but was relieved of liability from *Ryan*-type indemnity suits brought by the vessel. The vessel lost its indemnity rights against the stevedoring company, but had its liability to longshoremen limited to cases where its negligence can be proved.

*Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644, 650 (N.D. Cal. 1974), *modified by Gallardo v. Westfal-Larsen & Co. A/S*, 435 F.2d 644 (N.D. Cal. 1974); *see also Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979) ("Congress acted in 1972, among other things, to eliminate the shipowner's liability to the longshoreman for unseaworthiness. . . .").

One of the "most controversial and difficult issues" facing Congress concerned "the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." H. R. Rep. No. 92-1441, 92d Cong., 2nd Sess., *reprinted in* U.S.C.A.N. 4698, 4701-02 (1978) (hereinafter "H.R. Rep-No. 92-1441"). After careful consideration, Congress enacted section 905(b) of the Amendments which eliminated a longshoreman's right to bring suit against a vessel owner based upon theories of unseaworthiness or a non-delegable duty to provide a safe place to work. The stated "purpose of [these] amendments [was] to place [a longshoreman] injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and *not* to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness', 'non-delegable duty', or the like." *Id.* at 4703. Therefore, while the vessel was to remain liable for "its own negligence," the Committee Reports clearly indicate that Congress did not intend for vessel owners to be held liable "for injuries which are really the fault of the stevedore." *Id.* at 4704.

Although Congress made it clear that shipowners shall only be held liable for their "own negligence," it did not specify the acts or omissions that would constitute negligence. Instead, Congress left this issue to "be resolved through the application



of accepted principles of tort law and the ordinary process of litigation – just as they are in cases involving alleged negligence by land-based third parties." *Id.* After the 1972 Amendments became law, the lower federal courts reached varying conclusions regarding the construction and application of § 905(b). In *Scindia*, therefore, this Court defined the duties of a vessel owner. *Scindia*, 451 U.S. at 175-76. In doing so, this Court drew a sharp distinction between the duties owed by a vessel owner before the vessel is turned over to the stevedore for cargo operations, and the vessel owner's obligations after cargo operations have begun.

Before cargo operations have begun, this Court held that the vessel owes to the stevedore and its longshoremen employees a duty of "ordinary care" to have the "*ship and its equipment*" in a reasonably safe condition, and a corollary duty to warn about hidden hazards involving the ship's structure that would not be obvious to or anticipated by a reasonably competent stevedore:

> This duty extends at least to exercising ordinary care under the circumstances to have the *ship and its equipment* in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, *and to warning* the stevedore of *any hazards* on the ship *or* with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

*Id.* at 166-67 (citations omitted). The duties discussed in this passage have been termed the "turnover duty" and its companion "duty to warn." As noted, they define the shipowner's conduct before cargo operations have begun. The *Scindia* case, however, concerned a vessel owner's duty of care after the vessel has been turned over to the stevedore for cargo operations:

> We are of the view that absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself. This conclusion is plainly consistent with the congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, *is* entitled to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations.

*Id.* at 168-69, 172 (citations omitted).

In *Scindia,* therefore, this Court held that a vessel owner does not have a duty to supervise or inspect the cargo operations of an independent stevedore and, generally, cannot be held liable for hazards that are created or arise during the course of the cargo operations. This Court did leave open the possibility, however, that a vessel owner may have a "duty to intervene" in the cargo operations of a stevedore under very limited circumstances. Finally, this Court stated that a "vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman. . . ." *Id.* at 167.

As this discussion demonstrates, this Court discussed three duties in *Scindia*: (1) the "turnover duty" and the corollary "duty to warn;" (2) the "duty to intervene;" and (3) the "active participation duty." The present appeal, however, does not involve any of these duties. Instead, petitioner seeks to impose upon vessel owners a duty to "inspect" the work of an independent stevedore, a duty which was specifically rejected in *Scindia*. In an effort to bring this duty within the holding of *Scindia*, petitioner has characterized his theory of liability as a breach of the first *Scindia* duty – the "turnover duty" – since the vessel was turned over to the discharging stevedore with an alleged hidden defect in the cargo stow. The "turnover duty," however,



is not at issue for two reasons: (1) the turnover duty is limited to the "ship and its equipment;" and (2) the turnover duty does not require ongoing inspections after the vessel has been turned over to the stevedore. Petitioner readily admits that the duty he seeks to impose upon vessel owners is a duty to "inspect [] the condition of [the] cargo stow at *each subsequent port* at which that cargo stow may be encountered." *See* Petitioner's Brief at p. 28 (emphasis added).

## III. IN *SCINDIA*, THIS COURT ALREADY DECIDED THAT VESSEL OWNERS DO NOT HAVE A DUTY TO SUPERVISE OR INSPECT THE CARGO OPERATIONS OF AN INDEPENDENT STEVEDORE.

The sources of cargo hazards are many and varied due to the nature of the shipping business:

> In almost every instance, when a stevedoring contractor commences the work of loading or unloading a seagoing vessel, the ship has arrived in port only a few hours before. She may have been at sea for weeks or months. Almost always, she has ridden some heavy seas. Often she may have rolled and pitched through mountainous seas for days, taken thousands of tons of water over her decks, sailed through freezing and tropical weather, and been beaten by 100 mile an hour gales. Almost surely she will have been serviced by stevedores of varying degrees of competency in other ports throughout the world.

*Hugev v. Dampskisaktieselskabet Int'l*, 170 F. Supp. 601, 609 (S.D. Cal. 1959), *aff'd sub nom. Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l*, 274 F.2d 875 (9th Cir. 1960), *cert. denied*, 363 U.S. 803 (1960). In the present case, this Court has granted certiorari to determine the duties of a vessel owner pertaining to one particular type of cargo hazard – a hazard that is "hidden"[6] from view by the loading operation of an indepen-

6. The phrase "open and obvious" is a term of art that has developed following this Court's decision in *Scindia* for describing conditions that would be "open and obvious to a reasonably competent stevedore." Therefore, when cargo conditions are discussed, the phrase "open and obvious" connotes a level of expertise in cargo operations which is not possessed by shipowners.

dent stevedore, but would be discoverable by a reasonably competent discharging stevedore.[7] The duty Petitioner seeks to impose regarding this type of condition is set forth on page 27 of his Brief:

> [S]ince it is the practice in the maritime industry for the crew of the ship to observe cargo operations while they are in progress, recognition as part of *maritime negligence* law of the 'principle' that a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make 'reasonable' (not continuous) inspections of that work. . . ."

*See* Petitioner's Brief at p. 27. According to the petitioner, therefore, vessel owners have a duty to conduct "reasonable" inspections of the work performed by independent stevedores (whether they are loading or unloading the vessel) for the safety of the longshoremen in the next port; if a longshoreman is injured in the next port due to a condition in the cargo stow, the vessel owner would be liable under the concept of "maritime negligence."[8]

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7. According to the "Question Presented" by the petitioner in his Brief, this appeal is limited to whether a vessel owner has a duty to inspect the work of an independent stevedore for the safety of the longshoremen in the next port to protect them from a condition in the cargo stow. To support his argument, petitioner states that the condition was "unknown to the longshoreman and his stevedore employer." In his Memorandum opinion, however, the district judge concluded that the condition was "open and obvious." (J.A. 46).

8. In his Petition for Writ of Certiorari, Petitioner set forth two questions for review. The second question was "whether evidence of the specific practice of the crew of a ship of observing cargo loading operations [gives] rises to a duty of care with respect to conditions which such observations might reasonably be expected to disclose." This Court denied the writ of certiorari regarding this question. As in land side law, there is certainly a point where a party hiring an independent contractor will be liable for exercising "control" over the contractor's work. Whether the practice of observing cargo operations is sufficient to impose liability under this theory, however, is not at issue in this appeal. The issue before this Court is simply whether a vessel has a duty, in the first instance, to supervise or inspect the loading operation of an independent stevedore.



### A. *Scindia* Revisited

As a result of the 1972 Amendments, longshoremen received a "vast" increase in compensation benefits. *See* H.R. Rep. No. 92-1441 at 4703. The benefits available to longshoremen now greatly exceed the benefits available in other industries.[9] In light of these increased benefits, Congress determined that there is "no compelling reason to continue to require vessels to assume what amounts to an absolute liability for injuries which occur to longshoremen" while working aboard a vessel:

> Accordingly, the Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer for all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessels for the liability of vessels as third parties to be predicated on negligence rather than the no-fault concept of seaworthiness. This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits.

*Id.* at p. 4703.

In *Scindia*, the respondent-longshoreman, like the petitioner in this case, contended that the vessel had a "continuing duty to use reasonable care to discover dangerous conditions" that arise during the course of cargo operations. *Scindia*, 451 U.S. at 168. Based upon the Legislative History cited above, this Court rejected this proposition:

> [W]e cannot agree that the vessel's duty to the longshoreman requires the shipowner to inspect or supervise the stevedoring operation. Congress intended to make the vessel answerable for its own negligence and to terminate its automatic, faultless responsibility for conditions caused

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9. The Amendments set compensation rates at 66.7% of a longshoreman's wages up to a maximum of 200% of the national average wage as computed annually; the maximum rate is now $738.30 per week. *See* House Report, U.S. Code Cong. & Admin. News, at p. 4700. Prior to the 1972 Amendments, the maximum compensation was $70.00 per week.

> by the negligence or other defaults of the stevedore. Cases holding the vessel liable on the ground that it owed nondelegable duties to protect the longshoremen from injury were rejected. It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the *loading or unloading* process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same.

*Id.* at 168-69 (footnote and citations omitted).

In the present case, as in *Scindia*, petitioner seeks to impose a duty upon vessel owners to inspect the work of an independent stevedore. Under petitioner's proposed rule, a vessel would not have a duty to inspect cargo operations for the safety of the men working in the hold at the time of loading, but the vessel would be held liable for injuries that occur in a subsequent port as a result of that loading operation.

Such a narrow and provincial reading of *Scindia* is not warranted by any language contained in that decision. This Court did not speak in terms of liabilities, but in terms of duties - vessel owners do *not* have a duty to supervise or inspect the work of independent stevedores. Therefore, although petitioner has presented his proposed duty of inspection under a new rubric, the duty he seeks to impose is exactly the duty which was rejected by this Court in *Scindia*.

### B. The Authorities Cited by Petitioner Do Not Provide A Basis for Requiring Vessel Owners to Supervise the Work of An Independent Stevedore

In support of his position, petitioner has cited a number of decisions from the Fifth and Ninth Circuit Courts of Appeals. In the opinions cited, these courts have ignored the Legislative History that accompanied the 1972 Amendments, have relied on factual assumptions which are incorrect, and have failed to



distinguish between the duties owed by vessel owners before and after cargo operations have begun. In addition, a careful review of the cases cited reveals that these courts have *not* adopted the "duty" proposed by the petitioner. In fact, no court has ever imposed the "duty" that he advocates. Furthermore, in support of his theory, petitioner relies upon the Restatement (Second) of Torts § 412. This section of the Restatement also does not impose the duty advanced by petitioner. There is no duty under the Restatement, or under any principle of negligence law, to inspect the work of an independent contractor in the absence of some "non-delegable" duty, a form of strict liability which was expressly rejected by Congress. The "duty" advanced by petitioner, therefore, is not supported by any authority whatsoever.

#### 1. Analysis of the *Turner* Decision

The genesis of petitioner's argument is found in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). In *Turner*, the Ninth Circuit Court of Appeals held that vessel owners have a duty to protect longshoremen "against concealed dangers [involving cargo] created by a foreign stevedore . . . ." *Id.* at 1304. Although the Ninth Circuit limited its holding to dangerous conditions created by *foreign* stevedores, petitioner has not limited his argument in this manner. Instead, petitioner asserts that vessel owners have a duty to inspect the cargo operations of all stevedores whether foreign or domestic. In support of his position, however, petitioner relies heavily upon *Turner* and the factual assumptions contained in that decision. As discussed below, respondent believes the Ninth Circuit's decision in *Turner* conflicts with the purpose and intent of 1972 Amendments, and this Court's decision in *Scindia;* in addition, *Turner* is an example of judicial encroachment upon the role of the legislature. Furthermore, the policy decisions made by the Ninth Circuit in *Turner* were based upon factual assumptions which are unsupported and, in many cases, are incorrect.

a. *Judicial Encroachment*

As noted above, the Legislative History to the 1972 Amendments reveals that Congress intended to eliminate causes of action against shipowners based upon unseaworthiness, non-delegable duty, or "any other special maritime theory of liability or cause of action." House Report, U.S. Code Cong. & Admin. News, at 4703. Congress stated that vessel owners shall only be liable for their "own negligence," which should be evaluated based upon "accepted principles of tort law." *Id.* at 4704. The duties that a vessel owner owes to longshoremen, therefore, are to be derived from the language of the 1972 Amendments, the expressed intent of Congress, and principles of negligence law. In *Turner*, however, the Ninth Circuit Court did not rely on these sources when the Court imposed a duty on shipowners to supervise the work of foreign stevedores. Instead, the Ninth Circuit created a judicial exception to § 905(b) based upon the law it believed Congress should have enacted.

In *Turner*, the Ninth Circuit concluded that a vessel owner should be held liable for a dangerous condition in the cargo stow created by a foreign, loading stevedore for two reasons: (1) ability to sue; and (2) safety concerns. As to the first reason, the Ninth Circuit noted that "[t]he foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it." *Id.* at 1304. The shipowner, on the other hand, according to the Ninth Circuit, can sue the foreign stevedore because "[s]ection 905(b) does not bar the shipowner from recovering against the foreign stevedore, only from recovering against the 'employer' as defined in the Act." *Id.* As to its second premise, although the vessel itself was not negligent, the Ninth Circuit felt that it would be appropriate to impose liability on the vessel since it "is the only one in a position to ensure the safety of the longshoremen." *Id.* The Court attempted to justify this judicial legislation in the following statement: "We do not believe that Congress, in enacting a careful scheme of compensation, could have meant to leave the longshoreman to the



mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy." *Id.*[10]

There are several fallacies with the Ninth Circuit's premises. First and foremost, the Ninth Circuit failed to cite any legislative intent to make shipowners liable for the negligence of foreign stevedores. In fact, such a holding is contrary to the plain language used by Congress. The Legislative History clearly indicates that shipowners are not to be held liable based upon any theory of non-delegable duty;[11] they are only to be held liable for their "own negligence."[12] In *Turner*, however, the

10. In the subsequent decision of *Carpenter v. Universal Star Shipping*, 924 F.2d 1539 (9th Cir. 1991), the Ninth Circuit described the duty established in *Turner* as a "failure to intervene." Id. at 1543. As discussed in Section V of this Brief, this characterization of the duty is noteworthy since it reflects the fact that the only duty at issue *during* cargo operations is the duty to intervene.

11. As discussed later in this Brief, there is no common law duty to supervise or inspect the work of an independent stevedore in the absence of a non-delegable duty.

12. The Legislative History is clear regarding Congress' intent to eliminate the concept of a non-delegable duty to provide a safe place to work:

> If we were to agree to just eliminate unseaworthiness, which is liability without fault, and then the longshoremen had the right to bring a negligence action against the shipowner, under the law we may wind up with identically the same situation that we have at the present time, because in the admiralty law there is not only the unseaworthiness but there is the duty, nondelegable duty, on behalf of the shipowner, to provide a safe place to work.
>
> That has been compared to negligence. That is nondelegable, and nondelegable in most cases means it is absolute liability. So if we have negligence, it would be a very easy thing for the court to say, 'well, Congress only eliminated unseaworthiness. Congress knew of the nondelegable duty to provide a safe place to work. So, therefore, the longshoreman has that right.'
>
> That right, which is a negligence concept in admiralty, would give the longshoreman practically the same right he has today. The industry would wind up with the same expenses for third-party cases and the benefits increased and, of course, the insurance costs.

Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess, Vol. 2790, at 117 (1972); *see also* Hearings on S.2318, S.525, S.1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., Vol. 2352, at 270-74, 654-56 (1972).

Ninth Circuit ignored this portion of the Legislative History and made no effort to premise the vessel's liability on negligence principles. Instead, the Court imposed liability on the shipowner based upon its opinion of the law Congress should have enacted. This is a clear case of judicial encroachment upon the role of the legislature.

This Court has repeatedly held that where a statute is the result of a "series of carefully crafted compromises," it is particularly appropriate to maintain "[s]trict adherence to the language and structure of the Act." *Community for Creative Non-Violence v. Reid,* 490 U.S. 730, 748 n.14 (1989). In fact, on several occasions, this Court has reviewed the application of the 1972 Amendments by a lower federal court and held that "the wisest course is to adhere closely to what Congress has written." *Rodriguez v. Compass Shipping Co.,* 451 U.S. 596, 617 (1981); *see also Director, OWCP v. Rasmussen,* 440 U.S. 29, 46-47 (1979); *Washington Metro. Area Transit Auth. v. Johnson,* 467 U.S. 925, 934 (1984); *Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256, 264-65 (1979). ("The reports and debates leading up to the 1972 Amendments contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.") Therefore, in the absence of a clear intent to impose a duty as dramatic as the one proposed by petitioner – imposing liability upon vessel owners for the negligence of foreign stevedores – the general rule should apply: "Ordinarily, 'Congress' silence is just that – silence.' " *Reid,* 490 U.S. at 749, *quoting, Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 686 (1987).

The silence of Congress on this particular issue is particularly persuasive. Congress was well aware "that the great bulk of all export and import shipping into and out of the United States is carried on. . . foreign flag vessels" (House Committee Hearings, Volume 2790, p. 296), and that "90 percent of the cargo that comes in or out of the United States, comes in or out on foreign vessels." (Senate Committee Hearings, Volume 2352,



at pp. 352-53). Despite these overwhelming statistics, Congress did not distinguish between the negligence of foreign stevedores and domestic stevedores when it stated that "the vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore." House Report, U.S. Code Cong. & Admin News, p. 4704 (emphasis added). Congress intended and expected that the vessel owner's liability in this scenario would be evaluated in accordance with "accepted principles of tort law" and would not be imposed "under any special maritime theory of liability or cause of action."[13]

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13. On page 23 of his Brief, petitioner quotes one section of the Legislative History to advance the notion that Congress intended to hold vessel owners responsible for the negligence of stevedores other than the "stevedore-employer." Petitioner, however, left out the last line of this paragraph, which states the following:

> This *listing of cases* is not intended to reflect a judgment as to whether recovery on a particular factual setting could have been predicated on the vessel's negligence.

H.R. Rep. No. 92-1441 at 4704.

As this last sentence indicates, this paragraph was simply a listing of cases where recovery under the doctrine of unseaworthiness is no longer permitted. These cases represent the most egregious examples of the "tortured liability triangle" since the vessel was held liable for the negligence of the longshoreman's own employer. Congress, however, did not limit the scope of the Amendments to eliminate only those claims against vessel owners which are based upon vicarious liability for the actions of the "stevedore-employer," which could have been easily accomplished. Instead, Congress clearly and unequivocally eliminated *all* causes of action based upon notions of unseaworthiness or a non-delegable duty to provide a safe place to work. As noted, Congress was well aware that most of the vessels that dock in the U.S. are loaded in foreign ports. If Congress intended to impose liability on shipowners for the negligence of foreign stevedores, it would have done so without resorting to such obtuse language.

Furthermore, as noted, petitioner has not limited his argument to the negligence of foreign stevedores; under his proposed duty, the vessel would be liable for the negligence of stevedores in every prior port, including prior U.S. ports. This section of the Legislative History, however, clearly states that vessels are *not* subject to liability for the acts or omissions of "stevedores subject to this Act," which would include U.S. stevedores in prior ports.

b. *Turner's Factual Assumptions*

As the foregoing discussion demonstrates, in *Turner*, the Ninth Circuit did not rely on the Legislative History of the 1972 Amendments, or principles of negligence law, to impose a duty of supervision on vessel owners. Instead, the Court judicially created an exception to section 905(b), and imposed on vessel owners a non-delegable duty to provide a safe place to work in those cases where cargo is loaded by a foreign stevedore. This alone is a basis for rejecting the *Turner* holding. Beyond this, however, many of the factual assumptions set forth in *Turner* are not accurate.

(i) *Ability to Sue*

In *Turner*, the Ninth Circuit stated that "[t]he foreign stevedore, who is presumably primarily at fault, may in many cases be beyond the reach of the court's processes, and the injured longshoreman would be unable to sue it." *Id.* at 1304. According to the Ninth Circuit, however, since the Amendments to § 905(b) only prevent shipowners from seeking indemnity from the "stevedore-employer," the vessel will be in a position to sue the foreign stevedore for indemnity. While technically this may be a correct interpretation of the Act, and appears to be a convenient and expedient method of channeling liability back to the negligent stevedore, factually, this argument is not grounded upon any reliable authority.

There is simply no authority cited by the Ninth Circuit to support its conclusion that a vessel owner will be in a better position to sue a foreign stevedore than an injured longshoreman.[14] A vessel calling in a foreign port may have no real or continuing contact with the port in question other than being ordered there by a charterer for a single visit. In addition, the Ninth Circuit's position assumes that all foreign countries permit indemnity actions by shipowners for accidents that occur in the United States. Again, there is no authority cited for this

14. In some situations, the injured longshoreman may be able to sue the foreign, loading stevedore directly. *See Muller v. Temura Shipping Co., 629 F. Supp.* 1024 (E.D. Pa. 1986).



proposition. Furthermore, even in countries where such indemnity actions might otherwise be permitted, the offending stevedoring company may be owned and/or operated by the government or a local municipality;[15] the foreign stevedore, therefore, would likely be protected from suit by the doctrine of sovereign immunity. Thus, in light of the lack of any authority supporting the Ninth Circuit's assumptions regarding indemnity actions, the practical effect of *Turner* must be viewed as simply imposing liability without fault upon the shipowner.

(ii) *The Vessel's Ability To Ensure Safety*

The second basis for holding a vessel owner responsible for the negligence of a foreign stevedore, according to the Ninth Circuit, is its belief that a vessel "can ensure" the safety of loading operations in foreign ports. The *Turner* Court stated that the vessel can "ensure" the proper loading of cargo by "choosing a reliable stevedore, supervising its work when necessary, and warning the off loading stevedore of concealed dangerous conditions created by the foreign stevedore." *Id.* at 1304. This belief is premised upon several incorrect assumptions.

As noted above, many foreign stevedores are owned by the state government or a local municipality. For this reason, vessel owners are frequently unable to "choose" their stevedore.[16] In addition, as a matter of practicality, members of the crew are frequently precluded by union regulations and work rules from intruding upon the work areas turned over to the stevedore.[17]

15. Respondent has been informed that stevedores in the following countries are owned and/or operated by a governmental agency: Philippines, Sri Lanka, Thailand, Hong Kong, Korea, El Salvador, Colombia and parts of Greece and Italy.

16. *See Whitfield v. Craigwin Co.*, 727 F. Supp. 183, 185 (E.D. Pa. 1989) (vessels calling at Singapore that do not have their own terminals are required to use the assigned stevedore). As noted in the previous footnote, the same is reportedly true in the following countries: Philippines, Sri Lanka, Thailand, Hong Kong, Korea, El Salvador, Colombia and parts of Greece and Italy.

17. *Munoz v. Flotz Merchante Grancolumbiana, S.A.*, 553 F.2d 837, 840-41 (2d Cir. 1977) ("Indeed, commercial reality and applicable union

Most significantly, members of a vessel's crew are not, and do not purport to be, experts in cargo handling and stowage; this is the job of the expert stevedoring contractor. Also, as discussed in the following section of this Brief, the Ninth Circuit's assumption that "[a]s between the vessel and the stevedore-employer, the vessel is the *only one* in a position to insure the safety of the longshoremen" is, in most cases, factually incorrect. *Id.*[18] In fact, most cargo accidents are caused by the negligence of the "stevedore-employer."

c. *Safety Concerns*

In *Turner*, the parties agreed that the "stevedore-employer could not have prevented [the] accident by any exercise of care." *Id.* Based upon the unique factual circumstances present in the

NOTES *(Continued)*

regulations preclude a rule that would require a non-expert constantly to intrude on the work of a master stevedore in the deepest recesses of the ship.")

18. In a subsequent decision, the Ninth Circuit indicated that, under *Turner*, a vessel owner simply has a duty to warn of hidden dangers. *Taylor v. Moran Agencies*, 739 F.2d 1384 (9th Cir. 1984). Thus, the vessel would not be held liable for open and obvious hazards in the cargo stow. Recently, however, a panel of the Ninth Circuit held that the rule established in *Turner* applied to open and obvious conditions as well. *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993). While this decision may be in accord with the Ninth Circuit's agenda, the *Riggs* panel failed to cite additional legislative history or any principle of negligence law which warrants the imposition of this non-delegable duty for the negligence of a foreign stevedore.

A significant aspect of the *Riggs* decision is the concurring opinion issued by Judge Rymer who recognized that the duty established in *Turner* may not be consistent with the intent of the 1972 Amendments or this Court's decision in *Scindia*:

> By imposing a turn over duty of care to protect stevedores from poor cargo conditions, we are exposing the shipowner to liability equally for lack of reasonable care as to the vessel or the vessel's equipment, and as to the condition of the cargo (at least when stowed by a foreign stevedore). It is unclear that this squares with the restrictive rules of liability of shipowners to stevedores envisioned by the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 905(b), or with the scope of a shipowner's duties recognized in *De Los Santos*. In any case, should *Turner* have led us astray, either the Congress or the Court can set us straight.

*Id.* at 1449.



*Turner* case, that may have been an accurate statement since the hazard, according to the description given, was a true "hidden condition" in the cargo stow. It is far from an empirical truth, however, that the discharging stevedore is always free of negligence in cases where it is alleged that the longshoreman was injured by a "hidden condition." In fact, a review of the reported cases dealing with cargo accidents reveals that the existence of a true "hidden" condition is a very rare occurrence; the majority of the time, the negligence of the discharging stevedore-employer is the primary, if not sole, cause of the accident. *See e.g., Hugev*, 170 F. Supp. at 612, and other cases cited below.

As the First Circuit Court of Appeals pointed out:

> A seagoing ship runs the constant risk of encountering severe weather. As a result, it is unlikely that cargo, no matter how carefully stowed, will emerge unscathed and unblemished from the journey. These conditions are known to exist and inhere in the very nature of seaborne commerce. The stevedore is hired for its expertise in handling cargo, including cargo which arrives from its journey in less than optimal condition. If stowage or the cargo itself represents a risk to the longshoremen, the stevedore normally has the right to remedy the defect, at the expense of the ship (as was done here with the partial remastering performed by the stevedore) or to discontinue unloading operations.

*Anderson v. Iceland S.S. Co.*, 585 F.2d 1142, 1151 (1st Cir. 1978);[19] *see also Hugev*, 170 F. Supp. at 609-10. Other courts have likewise recognized that discharging stevedores are hired for their ability to identify and cope with cargo hazards; in fact, the hired stevedore has a duty to identify and remedy such

19. As this quote from *Anderson* indicates, many cargo hazards arise during the voyage as a result of rough seas. If plaintiff's theory of liability is adopted, however, the vessel will be held liable for these hazards as well, even if the "hazard" was not present at the time of loading because, inevitably, it will be alleged that the condition would not have arisen if the cargo was stowed in a different manner. *See Derr*, 835 F.2d 490 (3d Cir. 1987).

hazards. *See Citizen v. M/V Triton,* 384 F. Supp. 198, 201 (E.D. Tex. 1974) ("The *duty* to discover and remedy a dangerous condition caused by the space between the bags of flour as stowed was clearly the responsibility of the stevedore which had control of the work being done in the hold . . . ."); *Hugev,* 170 F. Supp. at 610 ("stevedoring contractors hold themselves out as being trained and equipped to cope with these conditions and these dangers."); *Fedison v. Vessel Wislica,* 382 F. Supp. 4, 6 (E.D. La. 1974); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 366 (1962) ("The petitioner [stevedore] is in the business of handling cargo, and any danger created by the New York bales was at least as apparent to the petitioner as to the respondents. Under its warranty the petitioner had a *duty* to see that the danger was removed before proceeding to unload the Philadelphia cargo.") (emphasis added). The failure of a discharging stevedore to identify a hazard and take appropriate steps to protect the longshoreman is negligence. *Hugev,* 170 F. Supp. at 606; *See Spence v. Mariehamns R/S,* 766 F.2d 1504, 1507 (11th Cir. 1985). Therefore, contrary to what is asserted in petitioner's Brief, and the Ninth Circuit's assumption in *Turner,* most cargo accidents are the result of the discharging stevedore's negligence, i.e., as between the vessel and the stevedore-employer, the vessel is not the only one in a position to ensure the safety of the longshoremen. The instant case is a perfect example.

Petitioner Howlett was injured when he jumped down into a hole in the stow while a draft of cocoa beans was dangling overhead. According to petitioner's description, he slipped on a plastic sheet covering the deck area because he expected to find a covering of wood or paper. Testimony from plaintiff's co-workers established that the plastic was readily visible and, in fact, could be seen from the top deck of the vessel once the dangling cargo was removed. The stevedore-employer, therefore, was negligent by allowing a procedure of discharge whereby longshoremen jumped into open spaces in the cargo stow, with cargo dangling directly above them, without even determining what was at the bottom of the space. Furthermore, as between the vessel (whose crewmembers were not down in the hatch when the cargo was loaded or discharged), and the



stevedore-employer (whose employees were working in the hold prior to the accident and were in a position to identify the hazard if proper discharge procedures were observed), the stevedore-employer was tne "only one in a position to ensure the safety of the longshoremen." *Turner,* 651 F.2d at 1304.

Also, contrary to petitioner's assertion, the duty proposed by the petitioner will not result in increased safety for longshoremen. In fact, the opposite is true.[20] Pursuant to the compensation provisions of the Longshore Act, a longshoreman injured during the course of his work is entitled to receive compensation benefits which greatly exceed the benefits paid in other industries. An injured longshoreman cannot sue his stevedore-employer to recover any additional sum, but he can recover from a shipowner which is found to be negligent. Out of the longshoreman's recovery from the shipowner, however, the stevedore-employer is entitled to recoup its full compensation lien (33 U.S.C. § 933(g)(3)), and the shipowner is statutorily barred from seeking contribution or indemnity from the "stevedore-employer" under any circumstances (33 U.S.C. § 905(a)(b)). Therefore, if the position advanced by the petitioner is adopted, the stevedore-employer will recover its full lien even though its negligence, in most cases, will be a proximate cause of the accident. *See Edmonds v. Compagnie Generale Transatlantique,* 443 U.S. 256 (1979). Furthermore, there will be no incentive for the discharging stevedore to initiate and enforce safety procedures regarding the discharge of cargo (i.e. the purpose for which the expert stevedore is hired) because the vessel will be held liable for all hazards related to cargo. *See Scindia,* 451 U.S. at 181 (Powell, J. concurring) ("This would

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20. According to the information respondent has been able to obtain, it appears that longshore accident rates have *decreased* in the Third Circuit since the *Derr* decision was issued in 1988, while accident rates have *increased* in the Ninth Circuit over the same period of time. The following are the reported accident rates from the Philadelphia Marine Trade Association for longshoremen in the Port of Philadelphia, per 100,000 hours worked: 1988-74.5; 1989-74.5; 1990-65.8; 1991-72.5; 1992-70; 1993-48.6. For the same period, the West Coast injury/illness rate per 100 full-time longshore workers, as reported by The Pacific Maritime Association, are reported as follows: 1988-11.3; 1989-12.7; 1990-12.5; 1991-13.6; 1992-14.0; 1993-13.0.

decrease significantly the incentives toward safety of the party in the best position to prevent injuries, and undercut the primary responsibility of that party for ensuring safety.")[21]

**2. Fifth Circuit Analysis**

In his Brief, petitioner asserts that the Fifth Circuit Court of Appeals, like the Ninth Circuit, has held that shipowners are "chargeable with knowledge" regarding dangerous conditions "caused by the manner in which . . . cargo . . . was stowed in a previous loading port." *See* Petitioner's Brief at p. 17. This statement is incorrect.[22] A careful review of the decisions of the Fifth Circuit relating to cargo accidents reveals that it has never charged a shipowner "with knowledge" regarding the existence of a hidden condition in the cargo stow; thus, the Fifth Circuit has never imposed a duty on shipowners to inspect or supervise the work of an independent stevedore. Instead, the Fifth Circuit has imposed liability where the vessel *controlled* the manner of stowage, or the crew had *actual knowledge* of a dangerous condition and failed to warn the discharging stevedore. Dicta in a number of Fifth Circuit cases, however, reveals the confusion that arises when the duties set forth in *Scindia* are not properly distinguished.

In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), which was issued several months after *Scindia*, the Fifth Circuit

21. In his Brief, petitioner asserts that Section 41 of the Act provides an incentive to the discharging "stevedore-employer" to "provide safe working conditions for its longshoremen employees," but the "only incentive" for the *loading* stevedore is "the possible exposure to suit by the vessel." *See* Petitioner's Brief at p. 24. This is not true. U.S. loading stevedores must comply with Section 41 of the Act and all *loading* stevedores, whether foreign or domestic, by contract, custom and implied warranty have a duty to stow cargo "properly and safely." *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 130 (1956). The 1972 Amendments did not "undermine the justifiable expectation of the vessel that the stevedore would perform with reasonable competence and see to the safety of the cargo operations." *Scindia*, 451 U.S. at 172.

22. If the *Woods* decision stands for the proposition for which it was cited by petitioner (i.e. the vessel is "chargeable with knowledge" of stowage defects), it conflicts with the stated purpose of the 1972 Amendments and this Court's decision in *Scindia*.



Court of Appeals reversed a judgement in favor of the vessel owner because "the jury found that the defendant shipowner was negligent in the method and manner of stowing the cargo . . . ." *Id.* at 116. The evidence supporting the jury's verdict "included the fact that the chief mate had *actual knowledge* of the improper loading technique and failed to take action to either correct the stowage or warn the plaintiff or his co-workers of the dangerous conditions involved in the stow." *Id.* A review of the *Lemon* decision reveals that the Fifth Circuit did *not* impose a duty on the vessel owner to inspect the work of the loading stevedore (the duty at issue in this appeal). Read most broadly, the Court held that where a vessel has *actual knowledge* of a dangerous method of stowage, it may have a duty to intervene in the loading operation to "correct the stowage," or a duty to warn the discharging stevedore about the condition. Both of these potential duties are discussed below; they are separate and distinct, however, from the duty of supervision advanced by the petitioner.

Subsequent to its decision in *Lemon*, the Fifth Circuit addressed the issue of vessel liability for cargo stowage in the case of *Moser v. Texas Trailer Corp.*, 694 F.2d 96 (5th Cir. 1982). In *Moser*, the defendant, Crescent Petroleum, owned a housing module which was being transferred by barge to the Persian Gulf. An independent contractor loaded the module aboard the barge and, in doing so, several grates were removed from the module's second floor walkway. Plaintiff was injured when he fell through an opening created by a missing grate. Plaintiff sued Crescent Petroleum as the owner of the module and the "owner" of the barge:

> [A]pplying "the general law of torts," we held that since Crescent retained no control over the manner of performance of the work by the independent contractors who were loading the module and had no knowledge of the dangerous temporary condition created by them, it owed Mr. Moser no duty — absent a peculiarly unreasonable risk of physical harm — to discover and remedy hazards created by the contractors. We remanded the case, however, "for a

determination of Crescent's status as owner of the vessel and any attendant duties under 905(b)."

On remand the district court assumed rather than finding that Crescent was the shipowner and that the condition in the module was a dangerous condition in the vessel itself. Even so, the court held that Crescent breached no duty it owed Mr. Moser since his injury was caused by a transitory condition of which it had no knowledge, created by independent contractors over whom it retained no control. We affirm that holding for the reasons stated in our former opinion.

The liability as to third persons provided by 33 U.S.C. § 905(b) is one for the negligence. Since *Scindia*, at all events, it is clear that this liability is no more than, if as, extensive as that subsisting under "the general law of torts." Under that law, we held on the former opinion that no duty was owed Mr. Moser by Crescent. It follows that none was owed him under § 905(b).

*Id.* at 97-98 (footnote and citations omitted).

In *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), which was issued several years later, the plaintiff was injured due to the manner in which "fifty pound sacks of coffee" were stowed by a foreign stevedore. Although the Court determined that the vessel was "negligent in providing an unreasonably dangerous place to work," it did not impose a duty on the shipowner to inspect the work of the independent, loading stevedore:

> The shipowner's liability for damages arising from a dangerous stow is limited to situations where the shipowner knew or should have known of the dangerous condition. There was evidence here that the danger was obvious and that [the shipowner] directly contributed to it by not ordering dunnage. There was also evidence that before Harris was injured Grancolombiano knew that the cargo was improperly stowed and that the longshoremen were continuing to unload the cargo despite the inherent danger.



*Id.* at 299 (footnote and citations omitted) (emphasis added). As in *Lemon*, the Fifth Circuit in *Harris* used the phrase "should have known," but the imposition of liability was premised on the "actual knowledge" of the shipowner. Furthermore, the Court implied that the vessel may have been liable based upon a breach of the active participation duty ("contributed to it by not ordering dunnage"), or the duty to intervene ("longshoremen were continuing to unload the cargo despite the inherent danger.") The Court never stated, however, that the vessel had a duty to supervise or inspect the loading operation. In fact, the Fifth Circuit noted the following in a footnote:

> If an independent contractor performs the loading operations, and the shipowner reasonably has no knowledge of a dangerous condition thereby created, the owner may escape liability. *Here there was no evidence that Grancolombiana used an independent contractor to load the coffee in South America.*

*Id.* at 299 n.2 (emphasis added) (citations omitted).

In the case of *Woods v. Sammisa Co.*, 873 F.2d 842 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), the Fifth Circuit again addressed the liability of a vessel owner for a condition in the cargo stow. In *Woods*, the vessel was carrying a cargo of steel pipes, some of which were bound for Houston and some of which were bound for New Orleans. The cargo was loaded so that "some of the Houston pipe overlapped the forward ends of the New Orleans pipe." *Id.* at 845. The vessel was scheduled to dock in Houston first and, if it did, "the stow would have been reasonable." *Id.* at 851 n.10. The vessel's itinerary was changed, however, so the vessel docked in New Orleans first. When the vessel docked, the overlapping condition of the pipe was readily observable. Although the condition of the cargo was not unprecedented, "it was not the most common method" of stowage, and was considered by the longshoreman to be a "bad stow." *Id. at 845.*

The longshoremen were instructed to discharge the pipe "as carefully as necessary, even if that meant discharging the cargo one pipe at a time. " *Id.* A decision was made, however, to discharge the cargo in "three—or four—pipe" bundles. The

accident occurred when one of the bundles "jammed," causing it to swing around and strike the plaintiff. *Id.*

As in prior Firth Circuit decisions, the imposition of liability in *Woods* was premised upon the vessel's actual knowledge of the hazard:

> In *Lemon* . . . the plaintiff sought to hold the owner liable because the chief mate had *actual knowledge* that the stevedore was utilizing improper loading techniques.
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> Although we noted the language in *Scindia* to the effect that the shipowner has *no duty to supervise cargo operations or inspect the cargo,* we extended *Scindia*'s imposition of a duty on the shipowner to correct, as to all dangerous conditions including those relating to cargo, equipment-related and other defects *of which it has actual knowledge and which it actually knows the stevedore does not intend to correct.*

*Id.* at 848-49 (emphasis added).

Clearly, the foregoing excerpt from the *Woods* decision suggests that the Fifth Circuit did not impose a duty on the vessel owner to supervise or inspect the work of an independent stevedore to prevent the creation of a hidden hazard in the cargo stow, i.e., the duty proposed by the petitioner. In subsequent dicta, however, the Fifth Circuit made the following statement, purportedly relying upon its prior decisions in *Lemon* and *Harris:* "[I]t is the law in this circuit that, under the first *Scindia* duty, a vessel interest has an obligation to exercise due care to ensure that the vessel's cargo is loaded such that it can be discharged with reasonable safety." *Id.* at 550. Since this later statement seems to support petitioner's argument, a further analysis of the *Woods* decision is warranted.

In *Woods,* the Fifth Circuit did not cite any authority to support the imposition of a duty of inspection other that its prior decisions in *Lemon* and *Harris.* As discussed above, these decisions were not nearly as broad as the *Woods* panel assumed. Furthermore, in *Woods,* the panel recognized that under the Fifth Circuit's prior rulings in *Harris* and *Moser,* the vessel owner would not be liable for a cargo hazard if the loading



operation was performed by an independent contractor. *Id.* at 850 n.9. The Court concluded, however, that the vessel exercised sufficient "control" to impose liability since it hired the loading and unloading stevedores, and it exercised enough "control" over the cargo operations to ensure the safety of the vessel. *Id.* at 848 n.8 and 850 n.9. These statements evidence a lack of understanding regarding the level of "control" needed to impose liability for the acts of an independent contractor,[23] and a lack of appreciation that liability based upon retention of "control" is a form of active negligence, not imputed negligence for the acts of the stevedore as the *Woods* decision implies.

Thus, the Fifth Circuit's decision in *Woods* is inapposite to the issue on appeal since the case did not involve a hidden defect in the cargo, and did not address the question of whether a vessel owner, which does *not* control the loading operation, has a duty of supervision. As noted, although the language in the decision may imply such a duty,[24] this is attributable to an overly

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23. *See Grammer v. Patterson Servs., Inc.,* 860 F.2d 639, 644 (5th Cir. 1988), *cert. denied,* 491 U.S. 906 (1989) ("operational control only arises if the principal exercises direct supervision over the step-by-step process of accomplishing the work."); *see also* Restatement (Second) of Torts § 414, comment C.

24. The following is a synopsis of some of the more perplexing statements contained in the *Woods* decision:

> Thus, according to the defendants, when the [Supreme] Court stated that 'the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore,' [*Scindia*] 451 U.S. at 172, 101 S.C. at 1624, *it meant what it said.* This is so, the defendants contend, because actual control – the basis for the *Scindia* duties – over the cargo and cargo operations belongs, not to the owner/operator, but to the independent stevedore.
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> . . . .
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> Our Court, however, has already visited this question and reached the opposite result.
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> . . . .
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> In so holding in *Lemon,* we assumed that the shipowner has at least the power to control the actions of independent stevedores . . . . Without questioning our assumption that such power exists in theory and practice, we have continued to follow our holding in *Lemon.*

*Id.* at 848-49, *citing Lemon v. Bank Lines, Ltd.,* 656 F.2d 110 (5th Cir. 1981).

broad reading of the decisions in *Harris* and *Lemon*, the Court's failure to distinguish between the various duties owed by a vessel owner, and a misunderstanding regarding the level of "control" necessary to hold a party liable for the acts of an independent contractor.

It is also noteworthy that the *Woods* panel stated that it was holding the vessel liable for failing to "ensure" that the cargo "was loaded such that it can be discharged with reasonable safety." *Id.* at 850. A review of the facts in *Woods*, however, indicates that the accident occurred due to the negligence of the discharging stevedore, *not* the negligence of the loading stevedore. The cargo in *Woods* was stowed in a "reasonable" manner. Since the vessel proceeded to New Orleans first, however, the discharging stevedore was faced with a cargo condition that was not unprecedented, but was considered by the longshoremen to be a bad stow. At that point, the stevedore, the expert in cargo operations, was retained to unload the cargo in a safe manner. The stevedore, not the vessel, opted to lift three or four pipes at a time, which led to the accident. If the duty advanced by the petitioner is adopted, there would be no incentive for the discharging stevedore to employ the safest method of discharge, because, as in *Woods*, the vessel would be held liable for all cargo accidents and the stevedore would recoup its full compensation lien despite the fact that its negligence caused the accident. Therefore, the *Woods* decision is a good example of the result that will be achieved if the petitioner's duty is adopted – the vessel will be deemed liable for all cargo accidents, even those caused by the negligence of the "stevedore-employer."[25]

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NOTES *(Continued)*

These quotes, if anything, evidence the Fifth Circuit's recognition that imposing a duty of inspection conflicts with this Court's holding in *Scindia* and that its assumptions regarding the level of control maintained by vessel owners may not be consistent with actual practice.

25. The case of *Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982), likewise does not support the assertion that vessel owners are "chargeable with knowledge" regarding hidden conditions in a cargo stow. The *Gill* case involved an "open and obvious" cargo hazard and the court imposed liability, primarily, based upon a breach of the "duty to intervene." In addition, in *Gill*, the "triable issue was whether paper rolls had been stowed too tightly by the defendant shipowner itself." *Bandeen v. United Carriers*



### 3. Restatement and Negligence Principles

In enacting the 1972 Amendments, Congress specifically stated that the liability of a vessel owner shall be evaluated in accordance with accepted principles of negligence. In *Turner*, the Ninth Circuit ignored this mandate and imposed its own policy decisions to create a duty to supervise. In this appeal, petitioner, although relying heavily on *Turner*, has recognized this fallacy of the *Turner* case and the need to predicate the vessel's liability on "negligence." Thus, on pages 26-27 of his Brief, petitioner refers to section 412 of the Restatement as a basis for imposing liability and then asserts that this Court should recognize "as part of *maritime negligence* law . . . the 'principle' that a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make reasonable (not continuous) inspections of that work." There are several basic problems with this proposition. First, section 412 of the Restatement does not impose the type of duty advanced by petitioner. Second, this proposition is contrary to this Court's holding in *Scindia* that a shipowner does not have a continuing duty to discover and correct dangerous conditions that develop during the loading and unloading process. Third, although plaintiff may cloak his proposed duty of care as a form of "maritime negligence," it is simply an attempt to reimpose a non-delegable duty to provide a safe place to work upon shipowners.

Section 412 of the Restatement, when applicable, requires a party who hires an independent contractor to inspect the area "after the contractor's work is completed." Restatement (Second) of Torts, § 412. In his Petition for Writ of Certiorari, that is the duty petitioner purportedly sought to impose. *See*

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*(Panama), Inc.*, 712 F.2d 1336, 1340 (4th Cir. 1983). Simply stated, the Fourth Circuit did not impose a duty upon vessel owners to inspect the work of an independent loading stevedore. *See Bonds v. Mortensen*, 717 F.2d 123, 127 (4th Cir. 1983). Furthermore, even if read in this fashion, the decision provides no basis for disregarding this Court's finding that, in accordance with the 1972 Amendments, shipowners do not have a duty "to take reasonable care to discover dangerous conditions that develop or come to light during the loading or unloading." *Scindia*, 451 U.S. at 167.

Petition at pp. 8-9.[26] As respondent pointed out in its Brief in Opposition, the alleged unsafe condition in this case (i.e. plastic on the deck) could not be observed or discovered if an inspection was conducted after the cargo was loaded. See Response to Petition at p. 11. The same is true of all "hidden" conditions in the cargo stow. Therefore, even if section 412 of the Restatement were applicable to vessel owners, that duty would not support a finding of liability in this case.[27]

Recognizing this defect in his original theory of liability, petitioner now seeks to impose a duty on vessel owners to inspect the work of independent stevedores *during* the course of their cargo operations. Petitioner has failed to cite any section of the Restatement, or any other principle of negligence law, however, which imposes such a duty. Instead, petitioner has asked this Court to create this duty under the rubric of "maritime negligence." Phrasing this duty in terms of "negligence," however, does not fulfill Congress' intent. *See* House and Senate hearings cited in footnote 12. The duty petitioner seeks to impose, no matter how it is termed, is a non-delegable duty to provide a safe place to work upon the shipowner.

As one court succinctly stated when discussing the liability of a party who hires an independent contractor, there is no "common law duty to make inspections and remedy situations created by an independent contractor . . . in the absence of some non-delegable duty." *Kirk v. United States*, 161 F. Supp. 722 (D. Idaho 1958), *aff'd* 270 F.2d 110 (9th Cir. 1959); *see also* Restatement (Second) of Torts, § 409, comment b. Also, as this Court concluded in *Scindia*:

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26. On pages 8-9 of his Petition, petitioner stated that "while, under *Scindia*, a vessel owner may not have a duty to supervise cargo operations while they are in process [sic], . . . the shipowner would have an obligation to inspect the work of a loading stevedore after it is completed to discover any unsafe conditions which might have been created as a result of that work." (emphasis added).

27. As discussed in section V of this Brief, a duty to inspect the condition of cargo at the end of the loading operation and/or before turning the vessel over to a discharging stevedore conflicts with the holding in *Scindia* and is another attempt to reimpose a non-delegable duty upon the vessel owner.



> It would be inconsistent with the Act to hold, nevertheless, that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the *loading or unloading* process. Such an approach would repeatedly result in holding the shipowner solely liable for conditions that are attributable to the stevedore, rather than the ship. True, the liability would be cast in terms of negligence rather than unseaworthiness, but the result would be much the same. '[C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b).'

*Scindia*, 451 U.S. at 169 (emphasis added) (citations omitted).

## IV. SEVERAL COURTS, INCLUDING THE THIRD CIRCUIT COURT OF APPEALS IN *DERR V. KAWASAKI KISEN K.K.*, 835 F.2d 490 (3d Cir. 1987), HAVE PROPERLY APPLIED THE LEGISLATIVE INTENT UNDERLYING THE 1972 AMENDMENTS AND THIS COURT'S HOLDING IN *SCINDIA* TO CARGO CASES AND DETERMINED THAT VESSEL OWNERS DO NOT HAVE A DUTY TO SUPERVISE OR INSPECT THE WORK OF AN INDEPENDENT LOADING STEVEDORE, WHETHER FOREIGN OR DOMESTIC.

In his Brief, petitioner asserts that "other than the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), every court which has had occasion to consider the issue" has held that vessel owners are "chargeable with knowledge" regarding the manner in which cargo "was stowed in a previous loading part." *See* Petitioner's Brief at p. 7. Again, this is not an accurate statement. As noted, the Fifth Circuit has never issued an opinion on point. Even in *Turner*, although the Ninth Circuit held that a vessel is "chargeable with knowledge" regarding stowage conditions, the Court limited its holding to stowage performed by foreign stevedores. In addition, contrary to what petitioner has asserted, other courts have considered whether a vessel owner can be held liable for a cargo hazard

created by an independent stevedore and have concluded that it would be inconsistent with the 1972 Amendments to impose the non-delegable duty proposed by the petitioner. In fact, a review of the case law in this area reveals that the decision in *Turner* was an aberration from the application of legislative intent and tort law as the guiding principles for defining a vessel owners' duty of care.

**A. Pre-*Turner* Decisions**

In *Teofilovich v. d'Amico Mediterranean Pac. Line*, 415 F. Supp. 732 (C.D. Cal. 1976), the plaintiff-longshoreman was injured while discharging crates of marble which were loaded by a foreign stevedore. Plaintiff was injured when one of the crates fell due to the improper placement of several strips of dunnage. "[P]laintiff argued that the vessel owed a non-delegable duty to inspect the work performed by the loading stevedore, an independent contractor employed by [the vessel owner] to load this cargo in a foreign port." Id. at 734. The district court rejected this argument. In doing so, the district court explained why it could not hold a vessel owner liable under the Restatement principles applicable to independent contractors and, at the same time, remain consistent with the legislative intent behind the 1972 Amendments:

> The shipowner no longer is vicariously liable for the negligence of the stevedore company and is prohibited from suing the stevedore for indemnity. 33 U.S.C. § 905(b). However, sections 413 and 416 of the Restatement would hold the shipowner vicariously liable for the negligence of the stevedore. This would do violence to the letter and policy of 33 U.S.C. § 905(b).
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> . . . .
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> Comment (f) to section 413 emphasizes that '. . . the extent of the employer's knowledge and experience in the field of work to be done is to be taken into account . . . .' The courts have long recognized that stevedore companies are expert in loading and discharging vessels but that shipowners are not. . . . It would hardly serve to minimize accidents to require that they be replaced by inexperienced crew members . . . .' This is why the courts created the



> right to indemnity in the first place, and also why Congress gave the shipowner immunity from vicarious liability for the negligence of the stevedore when it took away the shipowner's right to indemnity.
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> In its legislative history, Congress '. . . rejected the thesis that a vessel should be liable without regard to its fault for injuries sustained by employees covered under this Act while working on board the vessel.'
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> . . . .
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> Accordingly, the concept of non-delegable duty set forth in section 416 of the Restatement is repugnant to the legislative scheme embodied in the 1972 Amendments and to the uniformity required under the Federal Maritime Law. Indeed, to impose upon a shipowner a non-delegable duty to inspect or correct the work of an independent contractor would reimpose upon the shipowner a type of strict liability which Congress sought to abolish in the 1972 Amendments.
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> Since plaintiff has failed to prove that the vessel officers *knew* of the existence of the misaligned dunnage, or had a duty to inspect for this condition, the court finds that there is no showing of vessel negligence.

*Id.* at 734-36, 739 (emphasis added) (citations omitted) (*see also* cases cited therein).[28]

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28. In *Teofilovich*, the district court relied on the decision in *Hugev v. Dampskisaktieselskabet Int'l*, 170 F. Supp. 601 (S.D. Cal. 1959), *aff'd sub nom., Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l*, 274 F.2d 875 (9th Cir.) *cert. denied*, 363 U.S. 803 (1960), for defining a vessel owner's standard of care. This is of particular relevance since this Court adopted the standard set forth in *Hugev* when it defined the vessel's pre-turnover standard of care. *Scindia*, 451 U.S. at 166-67. Furthermore, in *Hugev*, although the district court recognized that hazards may arise aboard a vessel since it will be turned over to stevedores "of varying degrees of competency," the court limited the shipowner's duties ("implied in fact obligations") to conditions involving the ship and its appliances. *Id.* at 610.

The next decision on point was issued by the Second Circuit Court of Appeals in *Ruffino v. Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977). In *Ruffino*, the plaintiff-longshoreman was discharging tea and rugs which had been loaded in Calcutta, India, by independent stevedores. The plaintiff was working on top of the cargo when he stepped on a rug "which overhung a space between two pallets of tea." *Id.* at 862. Plaintiff alleged that the "space between [the] pallets should have been covered over with dunnage and that he had no way of knowing it was not, because the rugs which were piled some three feet high hid it from view. At the same time, however, plaintiff sought *to charge defendant shipowner* with knowledge of this hidden condition." *Id.* (emphasis added). The Court of Appeals rejected this argument:

> In enacting the 1972 amendments . . . Congress intended to relieve shipowners of liability predicated upon the negligence of stevedoring companies. *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976). After the amendment, Congress said, the vessel would be liable only for its own failure to use reasonable care, *Munoz v. Flota Merchante Grancolombiana, S. A.*, 553 F.d 837, 840 (2d Cir. 1977), which would be determined in accordance with land-based principles of negligence. *Napoli, supra* at 507.
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> . . . .
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> We have here a condition which was allegedly defective but was concededly latent, i.e., located in the in-shore wing of the upper tween deck and hidden from view by layers of carpets. The shipowner was not required to supervise the minute details of the loading stevedores' work. There was no proof that it did so. We cannot say that the district court erred in directing a verdict for the defendant because of plaintiff's failure to establish that the defendant had notice of the claimed defect.

*Id.* at 862-63 (citations omitted).

In *Teofilovich* and *Ruffino*, both of which were decided before *Turner* and *Scindia*, the courts reviewed the legislative



history behind the 1972 Amendments and principles of negligence law, and determined that vessel owners cannot be held liable for cargo hazards created by a independent stevedore, absent actual knowledge of the condition. *See also, Ramirez v. Toko Kaiun K.K.*, 385 F. Supp. 644 (N.D. Cal. 1974), *modified by Gallardo v. Westfal-Larsen & Co.*, 435 F. Supp. 484 (N.D. Cal. 1977); *Fedison v. Vessel Wislica*, 382 F. Supp. 4 (E.D. La. 1974); *Citizen v. M/V Triton*, 384 F. Supp. 198 (E.D. Tex. 1974); *cf. Raymond v. I/S Caribia*, 626 F.2d 203, 206 (1st Cir. 1980), *cert. denied*, 451 U.S. 969 (1981) ("In the normal case, it is the condition of the ship, not the cargo, for which the vessel may be held responsible."); *Woods v. Partenreederei M/S Yankee Clipper*, 677 F. Supp. 46, 48 (D. Mass. 1987) ("the shipowner's duty of care does not generally require it to inspect the cargo, since it is entitled to rely on the expertise of the stevedore to ensure that the cargo does not pose any unreasonable risk to the longshoremen"). In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), the Third Circuit Court of Appeals reached the same conclusion.

**B. *Derr***

In *Scindia*, this Court defined the duties of a vessel owner consistent with Congress' intent that the liability of a vessel owner shall be predicated upon principles of negligence and to eliminate notions of seaworthiness and "non-delegable duty." This Court rejected a strict application of the Restatement principles applicable to land side law, but adopted a framework of shipowner conduct that is based on the negligence of the vessel's crew. As this Court pointed out, Congress did not intend vessels "to be liable . . . for the acts or omissions of stevedores, or the employees of stevedores, for the manner in which the stevedore performed its work, or for its gear or equip[illegible]" *Scindia*, 451 U.S. at 165 n.13. Therefore, this Court held that "[i]t would be inconsistent with the Act to hold . . . that [a] shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the *loading* or *unloading* process." *Id.* at 169 (emphasis added). Thus, once the vessel has been turned over to the vessel for cargo operations, "[t]he shipowner, within limits *is* entitled

to rely on the stevedore, and owes no duty to the longshoremen to inspect or supervise the cargo operations." *Id.* at 172.

In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987), the Third Circuit Court of Appeals applied the framework set forth in *Scindia* to the issue of shipowner liability for the negligent stowage of cargo by an independent stevedore. The *Derr* Court held, true to the language and intent of *Scindia*, that a vessel owner does not have a duty to supervise the work of longshoremen employed by an independent stevedore; consequently, the vessel cannot be held liable for the negligence of longshoremen working in the hold, whether they are loading or unloading the vessel. In addition, the Third Circuit properly rejected any distinction between foreign and domestic stevedores.

The *Derr* decision involved two cases which were consolidated for appeal. Both cases involved longshoremen who were allegedly injured due to the manner in which cargo was stowed by a foreign stevedore. In both cases, the cargo had shifted during transit and it was alleged by plaintiffs' expert "that the cargo would probably not have moved or shifted had it been properly secured by the foreign longshoremen." *Id.* at 491. In the discharge port, the condition of the shifted cargo was "open and obvious," although the lack of proper shoring or lashing had been a hidden condition in the loading port. In both cases, the district court granted a directed verdict, "holding that under the Supreme Court's decision in *Scindia* . . . the vessel had no duty to inspect or supervise the handling of cargo, and no duty to warn of a dangerous cargo condition which is open and obvious or of which it is unaware." *Id.; see also Robertson v. Tokai Shosen K.K.*, 655 F. Supp. 152 (E.D. Pa. 1987) (district court opinion).

On appeal, the plaintiffs argued that the vessel had a duty to inspect the work of the loading stevedore during the loading operation or in the next port, before turning the vessel over for discharge operations. Relying on this Court's ruling in *Scindia*, the Third Circuit rejected this proposal:

> *Scindia* compels the holding that the shipowner has no duty to supervise or inspect cargo loaded or unloaded by



> stevedores and therefore may not be held liable for injuries arising out the stevedore's failure to perform his job properly.
>
> . . . .
>
> In a similar effort, the appellants urge this court to revive the duty of supervision by adopting an excessively narrow reading of *Scindia*. Appellants would have it that, while there is no duty to supervise the work of a stevedore 'to discover dangerous conditions that develop within the confines of the cargo operations,' . . . the vessel does have a duty to inspect the cargo before cargo operations begin and therefore *'is charged with knowledge of*, conditions which exist at the start of cargo operations.'
>
> . . . .
>
> The district court in *Robertson* thought this reading would "eviscerate" *Scindia* and the Act: 'while the vessel would not be required to supervise and inspect each stevedoring operation . . . it would be held to such a requirement at each subsequent port which encountered the condition of the stow. This makes no sense, and would render the principle of fault-based liability of the vessel a nullity.' We agree.
>
> . . . .
>
> Derr and Robertson suggest that although *Scindia* signifies that the vessel may not be liable for the negligence of the American stevedore employer, the shipowner may be held liable for unsafe conditions created by improper stowage by a foreign loading stevedore. They rely chiefly on the decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967, 103 S.Ct. 294, 74 L.Ed. 278 (1982).
>
> . . . .
>
> We cannot accept the *Turner* analysis. As *Scindia* makes clear, the 1972 amendments are grounded in the belief that stevedores are primarily responsible for the stowage of cargo. . . . . As this court has pointed out before, 'creation of a shipowner's duty to oversee the stevedore's

> activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b).'
>
> Thus the real issue is not where the cargo was loaded, but whether a vessel may be held negligent for failure to inspect or supervise the stowage of cargo. The scheme carefully drawn by Congress and interpreted in *Scindia* does not change because the cargo stowage was performed by foreign stevedores.

*Id.* at 493-95 (footnote and citations omitted) (emphasis added).

The holding in *Derr* is a proper application of the policy goals contained in the Legislative History to the 1972 Amendments, and a proper application of this Court's decision in *Scindia*. The Third Circuit properly concluded that imposing the duty proposed by the petitioner would saddle the shipowner with "precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Id.* at 495.[29]

29. In *Derr*, the Third Circuit properly noted that the pre-turnover duty of care does not apply to cargo conditions. The Court rejected the argument that the term "work space" was intended to include cargo:

> We construe that language to refer to the physical work space. The [Supreme] Court could not have intended by this reference to establish a duty by the ship with respect to cargo that it had expressly negated in other portions of the opinion.

*Id.* at 495-96. Contrary to what is asserted in petitioner's Brief, this is far from a "distinction without a difference." *See* petitioner's Brief at 29. The term "work space" refers to all aspects of the vessel's structure; items that the vessel controls and has a duty to maintain, repair and inspect. This is not true regarding "cargo," a term that was used throughout the *Scindia* decision, but was noticeably absent from the passage discussing the vessel's pre-turnover duties. Furthermore, as the Third Circuit pointed out, by inserting the term "work space" in this section of the *Scindia* decision, this Court could not have intended to impose a duty of supervision which was "expressly negated" throughout the rest of the opinion.



## V. OTHER THEORIES OF LIABILITY INVOLVING CARGO ACCIDENTS

As the foregoing discussion demonstrates, attempts have been made to impose liability upon vessel owners for cargo hazards created by an independent stevedore under various theories of liability since the passage of the 1972 Amendments and the elimination of the doctrine of unseaworthiness. This Court's holding in *Scindia*, which was properly interpreted in *Derr*, forecloses the theory asserted in this appeal, i.e., the vessel owner has a duty to supervise and inspect the loading operations of an independent stevedore. Although beyond the limited scope of the issue presented in this appeal (as phrased by the petitioner and on the facts presented), a review of these other theories of liability reveals that the shipowner's liability for cargo conditions, if any, is limited to situations where the vessel has actual knowledge of a hazard and the condition would not be obvious to or anticipated by a reasonably competent stevedore. *See Scindia*, 451 U.S. at 167.

### A. Duty to Inspect Completed Stow

In his Brief, petitioner cites section 412 of the Restatement in support of his theory of liability. As previously discussed, this section of the Restatement, when applicable, imposes a duty to inspect the work of an independent contractor when the contractor's work is completed. In this case, and all "hidden" defect cases, the alleged hazard is not discoverable at this point in time. Furthermore, imposing a *duty* to inspect the work of an independent stevedore at any time would be inconsistent with the purpose of the 1972 Amendments and this Court's ruling in *Scindia*.

The duty set forth in section 412 is limited to a possessor of land who has a non-delegable duty to maintain the land in a safe condition. *See* Restatement (Second) of Torts § 412, comments a and b. *See also Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1015 n.6 (5th Cir. 1980). Therefore, a duty to inspect the work of an independent stevedore at any time is inconsistent with the 1972 Amendments which eliminated theories of liability premised upon a non-delegable duty to provide a safe place to work.

Furthermore, imposing a duty to inspect after cargo operations are completed is inconsistent with this Court's holding in *Scindia*. This Court clearly stated that a vessel owner is "entitled to rely on the stevedore [to perform its job safely and properly], and owes *no* duty to the longshoremen *to inspect* or supervise the cargo operations." *Scindia*, 451 U.S. at 172 (emphasis added).

The same is true of the theory of liability premised on a duty to inspect cargo before the vessel is turned over for discharge operations. Again, this is simply an attempt to reimpose a non-delegable duty to provide a safe place to work. As discussed previously, the discharging stevedore has a *duty* to identify and remedy hazards before and during discharge operations, and the vessel owner has a justifiable expectation that this duty will be performed properly. In light of its experience and expertise, the discharging stevedore is in a far better position to inspect the cargo and identify potential hazards than the non-expert shipowner. Imposition of a duty to inspect on the shipowner would not serve any purpose in these circumstances other than to open the floodgates of third-party litigation.

**B. Duty To Intervene**

As noted in footnote 10, in *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539 (9th Cir. 1991), *cert. denied*, 113 S.Ct. 413 (1992), the Ninth Circuit described the duty established in *Turner* as a "failure to intervene." *Id. at* 1543. Although the Ninth Circuit later retracted this description and described it as "confusing," the "failure to intervene" reference is noteworthy. *See Riggs*, 8 F.3d at 1446 n.8. The Ninth Circuit, and the petitioner in this case, have characterized their theories of liability as a breach of the "turnover duty;" however, the only duty at issue *during* cargo operations is the "duty to intervene." The narrow duty to intervene established in *Scindia*, however, does not apply to cargo.[30]

30. Before the duty to intervene arises, the vessel must have actual knowledge of the alleged dangerous condition. *Scindia*, 452 U.S. at 175-76. Therefore, there was no duty to intervene in this case even if this duty applied to cargo conditions.



In *Scindia*, this Court set forth the "duty to intervene" in the following language:

> Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia [the shipowner], if it knew of the defect [in the ship's winch] and that Seattle [the stevedore] was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of its condition.

*Scindia*, 451 U.S. at 175-76.

In *Derr*, the Third Circuit reviewed the "duty to intervene" established in *Scindia* and concluded that it is "unlikely that the narrow duty of a ship to intervene to make repairs was intended to extend beyond defective conditions with respect to the ship, its equipment, and gear." *Id.* at 496. The Third Circuit concluded that "[s]ince the ship has no duty to inspect the cargo handling operation or the stowed cargo, there would ordinarily be no duty to intervene to remedy dangers created by negligently loaded cargo." *Id.* (citations omitted).[31] Significantly, even the Ninth Circuit has determined that the duty to intervene does not apply to cargo conditions because "the shipowner's equipment and acts did not cause the injury" and because

31. In a footnote in *Derr*, the Third Circuit noted that there was no evidence in that case "to suggest that the cargo presented an exceptional situation. We leave open the issue of a duty by the ship in such circumstances." *Id.* at 496 n.3. Likewise, the respondent in this case does not contest that a situation may arise in a foreign port relating to cargo which is so egregious and so fraught with danger that the shipowner, with actual knowledge of the condition, may have a duty to intervene for the safety of the longshoremen in subsequent ports. Such an exception, however, would have to be drafted with care and be even more stringent than the duty to intervene established in *Scindia*, since a basic premise of the 1972 Amendments and the *Scindia* decision is the shipowner's ability to rely on the stevedore to perform its job properly and safely for all concerned. The stowage of cargo is a matter particularly within the stevedore's expertise and it would be improper to place the vessel in a position of second-guessing the expert's decisions.

"the stevedore, and not the owner, [has] the expertise to prevent or correct" cargo hazards. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1543-44 and 1544 (9th Cir. 1991).[32] In both of these cases, the courts analyzed the issue in terms of a duty to intervene in the accident port. The same considerations would apply in the loading port, however, since it is the loading stevedore who is the expert in cargo operations. Therefore, in light of the presumed expertise of the stevedore, a duty to intervene in the loading port should not be imposed upon vessel owners to correct potential cargo hazards.

### C. Duty to Warn

In *Derr*, the Third Circuit also considered whether a vessel owner has a "duty to warn" about hazards involving the cargo stow. The Court concluded that, "[b]ecause the ship has no duty to inspect cargo stowage operations, the ship can be held liable for failure to warn of improper stowage, *if at all*, when the ship has both actual knowledge and the danger was not open and obvious." *Derr*, 835 F.2d at 496 (emphasis added).[33] In the present case, the district court found that there was insufficient evidence to support a finding that the vessel had actual knowledge of the alleged hazard. (J.A. 45-46). Therefore, a duty to warn did not arise. In addition, the district court found that the condition at issue (plastic on the deck) was not a true "hidden condition" from the perspective of the discharging stevedore; i.e. the condition would have been "open and obvious" to a reasonably competent stevedore. (J.A. 46).

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32. In *Carpenter*, the Ninth Circuit went to great lengths to distinguish *Turner*, but the basic premise in *Carpenter*, that "the stevedore, and not the [vessel] owner, [has] the expertise to prevent *or correct*" cargo hazards, serves to discredit the *Turner* analysis. *Id.* at 1544.

33. The duty to warn established in *Scindia* applies to the physical structure of the ship and the ship's equipment. Therefore, the *Derr* Court was unsure if there is ever a duty to warn about cargo conditions. If such a duty exists, however, the Third Circuit emphasized that actual knowledge of a hazard would be required since the vessel does not have a duty to supervise or inspect the work of independent stevedores.



In his Brief, petitioner asserts that the condition in question was not "open and obvious" because, under his interpretation of this phrase, the individual longshoreman must have actual knowledge of the hazard. To the contrary, this Court stated in *Scindia* that a vessel owner does not have a duty to warn about hazards that would be "obvious or anticipated by [a stevedore] if reasonably competent in the performance of his work." *Scindia*, 451 U.S. at 167. The plastic covering in this case falls squarely within this category. If the stevedore and its longshore employees used reasonable care to identify potential hazards while discharging the cargo as required by law, the plastic would have been readily discoverable. This was a secondary basis for the district court's finding that the vessel did not breach the duty to warn in this case. *See, e.g., Scindia,* 451 U.S. at 167; *see also Hugev*, 170 F. Supp. at 610.

In the last section of his Brief, petitioner criticizes the "*Derr* court" as the only court which relieves vessel owners of liability for open and obvious conditions. *See* Petitioner's Brief at p. 38. Again, this is an incorrect statement. The summary of "open and obvious" cases set forth by petitioner is incomplete and misleading. None of the cases cited imposed a duty on a shipowner to warn about an open and obvious hazard involving the cargo stow.[34] In petitioner's discussion of open and obvious hazards, it is not clear what duty he is seeking to impose upon the vessel owner; it appears, however, that petitioner is arguing that the vessel should have a duty to warn discharging stevedores about cargo conditions which are open and obvious. This argument is not supportable logically or legally.

As the Third Circuit pointed out in *Derr*, when a cargo hazard is open and obvious there is "no warning that the ship [can give that would add] to the knowledge of a competent stevedore." *Id.* at 496. Furthermore, the basic premise underlying the *Scindia* decision is the fact that stevedores are hired for their expertise in cargo operations, which includes their ability

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34. In *Riggs*, the vessel owner was held liable for an open and obvious hazard involving the cargo stow, but liability was premised upon the duty of inspection established in *Turner*, and not a duty to warn. *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993).

and duty to identify and deal with cargo hazards. Therefore, the *Derr* Court properly held that there is no duty to warn about open and obvious cargo hazards.[35]

Furthermore, the "duty to warn" is not applicable to hazards in the cargo for another important reason. The stevedore is presumed to be an expert in cargo operations and is hired to load and unload cargo. Under established principles of maritime law, an independent contractor who performs work aboard a shipping vessel may not recover if he is injured by the very condition he was hired to repair. *West v. United States*, 361 U.S. 118 (1959); *Hill v. Texaco*, 674 F.2d 447 (5th Cir. 1982); *Peters v. Titan Nav. Co.*, 857 F.2d 1342 (9th Cir. 1988); *Alphin v. Marquesa Maritime*, 747 F. Supp. 1223 (E.D. Tex. 1990). Therefore, if the vessel owner's liability for longshore accidents is premised on principles of negligence law as Congress intended, and not a special theory of liability, a vessel owner should not be held liable where an accident occurs as a result of an open and obvious hazard involving the cargo stow.[36]

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35. The cases cited by petitioner, other than *Riggs*, involved open and obvious hazards relating to the ship's walkways and equipment. Under those circumstances, the Third Circuit, and the other courts cited have held that a vessel may be liable for an open and obvious hazard, *if* there is evidence from which the vessel should anticipate that the stevedore will not or cannot avoid the hazard (petitioner left out this portion of the duty). In that situation, the vessel may have a duty to eliminate the hazard. *See e.g., Kirsch v. Plovidbva*, 971 F.2d 1026 (3d Cir. 1992). This exception simply does not apply when the hazard involves cargo because, unlike the "ship and its equipment," the vessel does not have a duty to maintain, repair or inspect cargo.

36. The *Amicus* Brief filed by the National Association of Waterfront Employers raises the novel, but totally indefensible argument that the duties imposed on a shipowner under the Carriage of Goods by Sea Act (COSGA), 46 U.S.C. §1300, et seq., provide a basis for imposing "non-delegable liability" on shipowners for accidents to longshoremen caused by the manner in which cargo was stowed by an independent stevedore. COSGA is a contractual-based statute enacted in 1936 which distributes liability for cargo damage between the shipowner and the shipper of the cargo; the statute has no bearing on the duties owed by a vessel owner to longshoremen who board the vessel and conduct cargo operations. *See Turner v. Japan Lines*, 651 F.2d 1300, 1305 (9th Cir. 1981) (the contract between the vessel owner and the charterer "was not relevant to the duty owed by either defendant to the plaintiff [longshoreman.]").



## CONCLUSION

In this appeal, petitioner seeks to impose liability on a shipowner for the improper stowage of cargo by employees of an independent stevedoring contractor. Imposition of such a duty would be contrary to the specific intent and purpose of Congress in enacting the 1972 Amendments, as well as this Court's prior holding in *Scindia*, for the reasons discussed in respondent's Brief.

In addition, a primary goal of Congress in enacting the 1972 Amendments was to create a workers' compensation system that was fair and just to injured longshoremen, and that would reduce the amount of expensive and unnecessary third party litigation arising from longshore accidents that was clogging the federal courts. Accordingly, the maximum compensation for injured longshoremen was increased from $70.00 per week to its current maximum rate of $738.30 per week, greatly exceeding the benefits available in other industries. Shipowners essentially underwrite the cost of the increased compensation benefits for

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NOTES *(Continued)*

The *Amicus* Brief readily admits that it seeks to impose upon shipownersa "non-delegable duty . . . to ensure that the cargo is carefully loaded and stowed in the vessel." *See Amicus* Brief at p. 11. *Amicus* fails to cite any authority either prior to, or subsequent, the 1972 Amendments in which the COGSA duty has been used as the basis for determining a shipowner's liability to an injured longshoreman; *Amicus* also fails to cite any basis for disregarding the mandate issued by Congress in 1972, eliminating claims against shipowners based upon a "non-delegable duty." Thus, even if COSGA had been the applicable standard of care prior to the 1972 Amendments, which it was not, the 1972 Amendments specifically eliminated any such a "non-delegable duty."

The *Amicus* Brief also fails to point out that even though the shipowner has a non-delegable duty of "due care" for the condition of cargo under COSGA, the shipowner is entitled to bring a claim for indemnity against a stevedore or other third party whose negligence in handling the cargo has imposed liability on the shipowner under COSGA. *See Francosteel Corp. v. SS Tien Chung*, 375 F.Supp 794 (S.D.N.Y. 1973). This in essence would be a return to the tri-party *Ryan Stevedoring* litigation which the 1972 Amendments were specifically designed to eliminate. The *Amicus* Brief also fails to mention other *"quid pro quo"* defenses available to the shipowner under COSGA in return for its "non delegable" duty relating to the condition of the cargo, including the $500.00 package limitation. 46 U.S.C. § 1304(5).

the stevedores' employees through higher stevedoring charges. In return, Congress eliminated the third party liability of shipowners for accidents to longshoremen not caused by the shipowner's own negligence, which significantly reduced the number of third party lawsuits. Reimposing liability on shipowners for the negligence of an independent contractor would not only improperly subject shipowners to costly third party claims, but it would also inundate the federal courts with personal injury lawsuits which Congress intended to fall within the workers' compensation provisions of the Longshore Act.

Finally, from a practical standpoint, there is absolutely no evidence to support the Ninth Circuit's belief that reimposition of a non-delegable duty on the shipowner for the negligence of the loading stevedore will increase safety for the discharging longshoremen. In fact, as noted in Section III(A)(1)(c) of this Brief, the contrary appears to be true, as was predicted in Justice Powell's concurring Opinion in *Scindia*.

For the foregoing reasons, respondent respectfully requests that the Judgment of the Third Circuit Court of Appeals and the Judgment of the District Court granting Summary Judgment in favor of respondent be affirmed.

Respectfuly submitted,

Carl D. Buchholz, III
Counsel of Record
Michael P. Zipfel
RAWLE & HENDERSON
The Widener Building
One South Penn Square
Philadelphia, PA 19107
(215) 575-4200

*Counsel for Respondent,*
*Birkdale Shipping Co., S.A.*